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IN THE

# Supreme Court of the United States

MOBIL CORPORATION AND HONEYWELL INTERNATIONAL INC.

*Petitioners*,

v.

BRUCE W. ADKINS, *et al.*,

*Respondents*.

**On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia**

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE AMERICAN CHEMISTRY COUNCIL

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## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States ("the Chamber") and the American Chemistry Council ("ACC") hereby move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amici curiae*. Consent to the filing of this brief has been obtained from counsel for the petitioners, Mobil Corporation and Honeywell International Inc. Counsel for respondents have refused consent. Copies of the letters giving and refusing consent have been lodged with the Court.

The Chamber is the world's largest business federation and represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy and conducting business throughout the United States and around the world. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in several hundred cases before the Court, including another recent case raising questions about West Virginia's approach to asbestos litigation. *See* Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Petitioner, *Norfolk & W. Ry. Co. v. Ayers*, No. 01-963 (U.S. 2002).

The ACC is a trade association representing companies engaged in the business of chemistry. Its members include more than 150 leading companies accounting for more than 90 percent of the production of basic industrial chemicals within the United States. The ACC engages in advocacy designed to address major public policy issues of interest to its members.

The issues at stake in this case are of direct concern to *amici* and their members. Many members of the Chamber and the ACC are defendants in the proceedings below, and still others could be named as defendants in future proceedings. Asbestos litigation is a growing concern for members of both *amici*, because the number of asbestos defendants has been increasing in recent years. An August 2001 study by the RAND Institute for Civil Justice reports that more than 1000 corporations have been named as defendants in asbestos suits and predicts that the final list "will ultimately number several times that." Deborah Hensler *et al.*, RAND Inst. for Civil Justice, *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 11 (2001). The corporations identified by RAND range across 44 of the Department of Commerce's 82 "Standard Industrial Classifications," which means that they "span more than half of the industries in the economy." *Id.* *Amici*, with their broad membership, are well qualified to offer the views of such a large group of interested parties.

*Amici* have grave concerns about the immediate and irreparable harm their members will face if this Court does not intervene to correct the federal constitutional errors of the courts below. West Virginia's Trial Court Rule 26.01, which was interpreted below to permit the aggregation of upwards of 8,000 claims against more than 250 defendants without any threshold inquiry into the existence of common questions or the risk of prejudice, violates the due process rights of defendants to a trial in which the fact-finder can make sense of the evidence and defenses. In addition, the ruling below that West Virginia law will govern even claims that have no connection to West Virginia is directly contrary to this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

If this Court does not grant certiorari and correct the errors below immediately, defendants, including many of *amici*'s members, will likely never receive relief, because the pressure to settle in the face of potentially crippling liability will be all

but irresistible. And even if end-of-trial review were a reasonable possibility, *amici*'s members would still face irreparable harm in the interim in the form of declining stock prices, reduced access to capital, and, in some cases, perhaps even bankruptcy. Accordingly, *amici* have a great interest in securing expeditious review of the questions presented. The motion for leave to file the attached brief *amici curiae* in support of the petition should be granted.

Respectfully submitted,


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## QUESTIONS PRESENTED

1. Whether the Supreme Court of Appeals of West Virginia erred in holding, contrary to the decisions of other federal and state courts, that the Due Process Clause of the Fourteenth Amendment permits the aggregation for a mass liability trial of thousands of disparate product-liability claims against hundreds of defendants without any inquiry into the commonality of those claims or the prejudice that would result from such an extraordinary undertaking.

2. Whether the Supreme Court of Appeals of West Virginia erred in holding, contrary to this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and in conflict with decisions of other federal and state courts, that the Due Process Clause permits a state court to apply its own state law to thousands of product-liability cases, aggregated for a mass trial, that the court itself has acknowledged has no connection at all to the state.

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## STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy and conducting business throughout the United States and around the world. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in several hundred cases before the Court, including another recent case raising questions about West Virginia's approach to asbestos litigation. *See* Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Petitioner, *Norfolk & W. Ry. Co. v. Ayers*, No. 01-963 (U.S. 2002).

The American Chemistry Council ("ACC") is a trade association representing companies engaged in the business of chemistry. Its members include more than 150 leading companies accounting for more than 90 percent of the production of basic industrial chemicals within the United States. The ACC engages in advocacy designed to address major public policy issues of interest to its members. Asbestos litigation is a growing concern for the chemical industry, as plaintiffs' attorneys are now targeting companies that never manufactured asbestos products.

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[1] Consent from counsel for petitioners Mobil Corporation and Honeywell International Inc. has been filed with the Clerk of this Court. Because counsel for respondents have refused to give their consent, this brief is accompanied by a motion for leave to file a brief for *amici*. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to this brief's preparation or submission.

As explained in more detail in the accompanying Motion, the issues at stake in this case are of direct concern to *amici* and their members. Many of those members are defendants in a large number of the thousands of asbestos product-liability cases consolidated for a mass trial below. As a result of West Virginia's liberal procedures and national reputation as a jurisdiction friendly to asbestos plaintiffs, *amici*'s members also face the prospect of countless additional asbestos suits in West Virginia's courts in the future. *Amici* have grave concerns about the immediate and irreparable harm their members will face if this Court does not intervene to correct the constitutional errors of the courts below.

## STATEMENT

This case presents two important constitutional questions regarding aggregate mass-tort litigation: first, whether a court may aggregate thousands of product-liability claims against hundreds of defendants without making a threshold inquiry into the fairness of aggregation and, second, whether a state court may apply its own state law to claims that have not the slightest connection to the state.

These questions arise out of West Virginia's response to the so-called "asbestos litigation crisis" facing courts throughout the country. In the mid-1990s, asbestos claimants from all across the United States began to flock to West Virginia following a ruling that approved a mass consolidation of asbestos cases against 17 different defendants. The early consolidations proceeded under West Virginia's equivalent of Rule 42 of the Federal Rules of Civil Procedure, *see State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 302 (W. Va. 1996), but the West Virginia Supreme Court soon concluded that this traditional procedural device did not give trial judges sufficient "flexibility and leeway with regard to their handling of [mass asbestos] cases." Pet. App. 11a. The court's solution was to promulgate a special mass-litigation rule known as Trial Court Rule 26.01. Pet. App. 11a. The

new rule, which took effect on July 1, 1999, authorizes a panel of state trial judges "[t]o develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which may be referred to it by the Chief Justice." Pet. App. 36a. The rule itself does *not* mandate any sort of threshold inquiry into the fairness of consolidated proceedings, and the West Virginia Supreme Court held in the decision below that Rule 26.01 dispenses with the findings required under West Virginia's version of Rule 42. In particular, Rule 26.01 does *not* require the court to consider "(1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy; (2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits; (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and (4) the relative expense to all concerned of the single-trial, multiple-trial alternatives." Pet. App. 9a n.12 (quoting *State ex rel. Appalachian Power Co. v. Ranson*, 438 S.E.2d 609, 613 (W. Va. 1993)).

In late 2000, the Chief Justice of West Virginia invoked Rule 26.01 and referred all "asbestos-based personal injury cases in West Virginia" to the mass litigation panel. *State ex rel. Allman v. MacQueen*, 551 S.E.2d 369, 372 (W. Va. 2001). Of the approximately 8,000 cases believed to be subject to the Chief Justice's referral, as many as 5,000 involve claims by plaintiffs who neither live in West Virginia nor were exposed to asbestos in the state. Pet. App. 21a. The trial judge who was placed in charge of the consolidated cases entered a "master plan" calling for a series of group trials. *See* 551 S.E.2d at 372. On July 6, 2001, the West Virginia Supreme Court rejected the initial plan as not sufficiently expeditious and directed that all pending asbestos trials should commence no later than July 1, 2002. *See id.* at 375, 377. On September 6, 2001, a new supervising judge announced that he would conduct a single "mass trial" of all the consolidated asbestos

claims. A trial scheduling order followed on February 26, 2002, calling for the resolution of all pending claims against three groups of defendants: manufacturers, premises owners, and employers. Pet. App. 25a. Under the scheduling order, the trial is set to commence on September 23, 2002, with simultaneous jury trials for the three groups of defendants in the initial phase and mini-trials afterwards to settle questions of causation and damages. Pet. App. 7a. Claims against employers are to be decided under West Virginia Code § 23-4-2 (1994 & Repl. Vol. 1998). Pet. App. 7a, 25a.

Even before the new judge had entered the trial scheduling order, petitioner Mobil Corporation sought extraordinary relief in the form of a writ of prohibition or mandamus. (Rule 26.01 does not provide for interlocutory appeals.) The West Virginia Supreme Court treated Mobil's petition as a petition for a writ of prohibition, denied the writ, and indicated its intention "to allow the supervising judge to continue to fashion and implement various trial management plans without further intrusion by this Court." Pet. App. 18a.

## REASONS FOR GRANTING THE WRIT

As the petition explains, the traditional reasons for granting certiorari are present here: the decision below conflicts with the decisions of federal courts and other state courts concerning an important question of federal law. But *amici* wish to highlight additional reasons why it is important for this Court to grant certiorari, and to grant it now. First, this may be the only chance for review of the constitutional questions presented, because the pressure on petitioners and other defendants to settle if the case is allowed to proceed will be irresistible. Second, petitioners and other defendants, including many of *amici*'s members, face immediate and irreparable harm as a result of decisions like the one below, which threaten to exert downward pressure on their share prices and credit ratings by encouraging the filing of

thousands of baseless claims that could not survive judicial scrutiny except through aggregation.

## I. THE CURRENT PETITION MAY REPRESENT THE ONLY PRACTICAL OPPORTUNITY FOR REVIEW BY THIS COURT OF THE IMPORTANT CONSTITUTIONAL QUESTIONS PRESENTED BECAUSE THE PRESSURE TO SETTLE IN AGGREGATE PROCEEDINGS IS IRRESISTIBLE

Review of the West Virginia Supreme Court of Appeals' denial of a writ of prohibition is essential. The decision below is, in every practical sense, a final and blatantly unconstitutional disposition of the proceedings. If the case is allowed to proceed further, the result is all but foreordained, and not only in this case but in others like it: defendants will almost certainly succumb to the pressure to settle before trial. Accordingly, the present petition likely represents the Court's only opportunity to correct the serious constitutional errors below.

Federal courts recognize that in certain cases involving particularly large stakes, postponing review is tantamount to denying review, because the pressure to settle before trial is so enormous. In such cases, courts have not hesitated to grant immediate review of questionable decisions. *See, e.g., In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J., specially concurring) (noting that mandamus review of decision to use bellwether trials in a mass proceeding of 3,000 cases "aggregated for trial management" was appropriate because "[t]he pressure on the parties to settle in fear of the result of a perhaps all-or-nothing 'bellwether' trial is enormous"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (citing as one reason for granting mandamus review of a class certification order "the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes" defendants) (emphasis in original).

This Court recently enshrined the same principle in the Federal Rules of Civil Procedure, when it approved Rule 23(f). The new provision rests in part on a concern that "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23 advisory committee's note; *see also Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000) (noting that one of the two purposes of Rule 23(f) is to "provide[] a mechanism through which appellate courts, in the interests of fairness, can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial"). The courts of appeals have agreed, without dissent, that "when the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial, an appeal under Rule 23(f) is in order," if the lower court's ruling is "questionable." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999); *accord In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100 (D.C. Cir. 2002); *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164-65 (3d Cir. 2001); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 142-43 (4th Cir. 2001); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000).

The same reasons that once led courts of appeals to review class certification orders under mandamus and now lead them to review such orders under Rule 23(f) lead also to the conclusion that certiorari is appropriate at the present juncture in this case. Indeed, the drafters of Rule 23(f) expressly likened the courts of appeals' "unfettered discretion" under the new provision to "the discretion exercised by the Supreme Court in acting on a petition for certiorari." Fed. R. Civ. P. 23 advisory committee's note.

### A. Aggregate Proceedings Place Irresistible Pressure on Defendants to Settle

While aggregation under West Virginia's Rule 26.01 is not precisely the same as class certification, both forms of mass proceeding raise the same concern: the likelihood that "the risk of potentially ruinous liability" will lead defendants to settle without regard to the merits of the underlying case. Fed. R. Civ. P. 23 advisory committee's note; *see also* Richard O. Faulk *et al.*, *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 Tex. Tech L. Rev. 779, 790 (1998) (noting that large aggregations raise the same settlement concerns as class actions). The inordinate pressure to settle exerted by the aggregation of claims under rules like West Virginia's Rule 26.01 is obvious. With the addition of each case, the stakes become higher, until finally, when enough cases are brought together in a single proceeding, the defendant faces what one commentator has called the "Armageddon scenario." *Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 89, 98 (1999) (prepared statement of William N. Eskridge, Jr., Professor, Yale Law School) [hereinafter "Eskridge Statement"]. If the amount at stake becomes large enough to threaten the continued existence of a corporate defendant, the pressure to settle becomes all but irresistible, even to the most rational of decisionmakers. Faced with the prospect of "losing the company on his or her watch," a general counsel or chief executive officer will often seek to settle even if convinced of the merit of the company's position. Lester Brickman, *Lawyers' Ethics and Fiduciary Obligations in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243, 252 (2001); *see also* Eskridge Statement, *supra* at 98 ("Even risk-neutral people and firms will tend to take too many precautions or pay too high a settlement price when the chance of devastating loss is significant."). As Judge Posner observed of a group of defendants facing the

prospect of as many as 5,000 claims in a single proceeding: "They may not wish to roll these dice. That is putting it mildly." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1298. Even the trial judge below commented that he anticipated mass settlements "[b]ased on the history of previous mass trials." Pet. App. 5a.

While this pressure to settle will presumably exist in any Rule 26.01 proceeding of any size, it is especially dramatic here. The 8,000 or more cases involved in the instant litigation clearly exert an "inordinate" pressure on defendants to settle, *Newton*, 259 F.3d at 164—at least as great as in most class actions. Asbestos trials often produce compensatory-damages awards in the millions of dollars per plaintiff, *see, e.g.*, Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 Tex. Rev. L. & Pol. 137, 142-43 (2001), raising the prospect in this case of potential compensatory liability in the billions of dollars. When the threat of punitive damages is added—and the trial court recently confirmed, in keeping with its trial scheduling order, that punitive damages will be assessed using a multiplier to be determined by the jury for each defendant—the amount at stake swells to several times that size.

And if the prospect of a massive judgment is not enough to bring any given defendant to the bargaining table, there are other features of the present consolidation that ratchet up the pressure to an even higher level. First, the aggregation of *all* pending asbestos product-liability cases in West Virginia, *see Allman*, 551 S.E.2d at 372, has inevitably resulted in the lumping together of seriously ill claimants with unimpaired claimants. Under ordinary circumstances, defendants might wish to settle only with ill claimants, but aggregation effectively deprives them of that option. The risk of not settling cases filed by unimpaired plaintiffs is that a jury will not carefully discriminate among the various individual claims

but will simply lump them together in reaching a decision in favor of plaintiffs. *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification magnifies and strengthens the number of unmeritorious claims."). Indeed, empirical research shows that "aggregation of most-injured plaintiffs with less-injured plaintiffs significantly increased the mean awards to the latter." Eskridge Statement, *supra*, at 96. Moreover, there have been reports that some plaintiffs' lawyers and courts will not permit defendants to settle the claims of sick plaintiffs unless they agree to settle the claims of unimpaired plaintiffs as well. *See* Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, Briefly . . . Perspectives on Legislation, Regulation, and Litigation (Nat'l Legal Ctr. for the Public Interest, Washington, D.C.), June 2002, at 23; Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247, 255 (2000). Aggregation thus raises the stakes by forcing defendants to take account of weak cases that might not otherwise figure in their settlement calculations.

Second, the presence of upwards of 250 co-defendants (Pet. App. 147a-156a) makes the decision not to settle riskier. In the ordinary consolidated case, including the ordinary class action, there is only one defendant, or at most a handful of defendants. A defendant deciding whether to settle in such a case need not consider the likely actions of other defendants. In a consolidation like the one ordered below, by contrast, each defendant must consider the possibility that other defendants will settle early and on favorable terms, leaving the hold-outs to face the prospect of dividing a massive award among them. As Professor Eskridge has explained, the presence of a large number of defendants will often lead to a "rush to settle." Eskridge Statement, *supra*, at 99. This is a "consequence of a classic prisoners' dilemma: Although

defendants realize that they should bargain as a group with plaintiffs' counsel, each defendant also understands that it can gain an advantage by settling early, and that it will be disadvantaged if others settle first (the sucker's payoff)." *Id.*

The questions raised by West Virginia's approach to aggregation are thus largely immune to end-of-trial review. As a result, if this Court does not intervene now, Rule 26.01 and West Virginia's unconstitutional approach to choice-of-law issues will go unchallenged.

### B. The Magnitude of the Constitutional Error Increases the Need for Review

The likelihood that mass settlement will deprive this Court of any later opportunity to answer the questions presented in the petition is especially troubling, because both the mass trial and the decision to apply West Virginia law to claims utterly unconnected to West Virginia violate the Constitution in fundamental ways. The West Virginia Supreme Court, through the promulgation of Rule 26.01 and through the ruling below, has instituted an entirely new form of aggregate proceeding that shares many of the same characteristics as class actions and Rule 42 consolidations, but has none of their procedural protections. In effect, it has devised a semantic solution to the problem of managing a massive asbestos docket—by giving mass aggregation a new rule number, it thinks to have dispensed with the need for any of the protections associated with rules numbered 23 and 42. The decision below was explicit on this point: "the adoption of [Trial Court Rule] 26.01 has effectively superseded the requirement that the [Rule 42] factors be used in all mass trial cases, especially where, as here, the cases proceed independent of the consolidation mechanisms set forth in Rule 42." Pet. App. 13a. Among other things, this means that a trial court proceeding under Rule 26.01 need not consider "whether the risks of prejudice and possible confusion

outweigh the considerations of judicial dispatch and economy." Pet. App. 9a n.12.

But while the West Virginia Supreme Court has succeeded in changing the form of the mass trial, it has done nothing to change its substance. The proceeding called for by the trial scheduling order is every bit as complex and troublesome as proceedings that federal and state courts have rejected on constitutional grounds in the past. The trial court has decided to conduct a single mass trial, in three simultaneous phases, to determine liability in 8,000 or more cases involving 250 or more defendants. Pet. App. 3a & n.3, 147a-156a. Represented by 30 or more law firms, plaintiffs claim to have used dozens of different products with different characteristics, different labels, and different applications at hundreds of different sites scattered across the country. Pet. App. 20a-21a. Despite this remarkable diversity of claims, the trial court opted for a single mass trial without making any preliminary findings about the presence of common issues or the fairness of aggregate proceedings, and, as noted above, did so with the blessing of the West Virginia Supreme Court. To ease the way to a single verdict, the trial court declared (and the West Virginia Supreme Court agreed) that West Virginia law would govern claims against all employer-defendants, even though more than 5,000 of the plaintiffs have no connection to West Virginia aside from a common interest in availing themselves of its "pro-plaintiff" procedures. Pet. App. 7a, 21a, 25a.

If the authority for this extraordinary proceeding had a more familiar name than "Rule 26.01," its many constitutional defects would be clear. First, Rule 26.01 dispenses with constitutionally necessary inquiries into commonality and the risk of prejudice. *See, e.g.*, *In re Chevron*, 109 F.3d at 1019 (granting mandamus and rejecting trial plan calling for a "unitary trial" of 3,000 crude-oil-contamination cases without "identify[ing] any common issues"); *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 354 (2d Cir. 1993) (noting that failure to

inquire into the existence of common questions of law or fact before consolidating 600 asbestos claims brought by plaintiffs exposed to asbestos in power-generating stations was a denial of "basic fairness"); *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 374 (2d Cir. 1993) (granting mandamus and reversing consolidation of 44 lawsuits alleging injuries arising from "repetitive stress" on ground that plaintiffs failed to carry burden "on the party seeking aggregation of discovery or other proceedings to show common factual or legal issues warranting it"). Without such inquiries, the risk that the finder of fact will not be able to consider the evidence rationally becomes intolerable. *See Malcolm*, 995 F.2d at 352. It is unreasonable, for example, to expect a jury confronted with 8,000 claims against more than 250 defendants to spend much time thinking about the differences between companies that manufactured masks and respirators, companies that manufactured automobiles, and companies that manufactured insulation, and yet those differences could be decisive in fairly determining liability.

Second, the plan devised by the trial court to implement Rule 26.01 poses a grave risk of violating due process by separating the liability trial from the claims of individual plaintiffs. Pet. App. 25a-27a. The complete absence of evidence pertaining to individual plaintiffs in the initial phase poses a serious risk of creating "a sterile or laboratory atmosphere in which causation is parted from the reality of injury." *In re Beverly Hills Fire Litig.*, 695 F.2d 207, 217 (6th Cir. 1982). In such an atmosphere, plaintiffs are free to "piece[] together" a "perfect plaintiff," a "fictional composite" that has suffered all of the harm alleged in the case at the hands of all defendants, even though no one plaintiff could ever really have been so harmed. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344-45 (4th Cir. 1998). To force defendants to defend against such a sympathetic fiction is obviously unfair. *See id.* at 345.

Third, a massive aggregation like the one proposed below inevitably requires separate fact-finders to consider interrelated and interwoven factual questions that can only fairly be addressed by a single fact-finder. *See, e.g.*, *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931) (noting that where two issues are "so interwoven" that one "cannot be submitted to the jury independently of the [other] without confusion and uncertainty," trying the two issues separately "would amount to a denial of a fair trial"). In this case, one jury will decide liability and other juries will decide causation and damages. Pet. App. 25a-28a. It is unclear, however, how the subsequent juries deciding cases involving individual plaintiffs and defendants will be able to make sense of a verdict arising out of the simultaneous trial of several hundred defendants. As for the choice-of-law ruling, Justice Maynard correctly observed in his concurring opinion below (Pet. App. 21a-22a) that it raises equally clear constitutional issues, running afoul as it does of this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). But clear as these violations are, if this Court declines to grant certiorari now, they will go unanswered, and not only now but into the indefinite future.

## II. THE PROSPECT OF AGGREGATE LITIGATION IN WEST VIRGINIA POSES AN IMMEDIATE AND SERIOUS RISK OF HARM TO HUNDREDS OF CORPORATIONS AND THEIR EMPLOYEES IN THE FORM OF DECLINING SHARE PRICES AND LOWER RETIREMENT FUND VALUES

Even if there were some realistic possibility of post-trial review in this case, the likelihood of immediate and irremediable harm to the financial health of defendants and other companies facing asbestos liability as a result of continued proceedings in West Virginia would justify an immediate grant of certiorari. The prospect of mass proceedings has an immediate effect on share prices and the value of employee retirement plans and even has the potential

to force companies into bankruptcy. The harm inflicted as a result is beyond the power of a court to remedy; the best a court can do is to intervene and order an end to the unconstitutional proceedings as quickly as possible.

The sensitivity of share prices to the prospect of asbestos liability is well documented. *See generally* Deborah Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int'l L. 179, 190 (2001) ("If the [consolidated] cases are tried, the potential for large verdicts may drive stock prices lower."). Examples abound of companies whose share prices dropped, sometimes precipitously, in direct response to reports of asbestos liability. Perhaps the most recent example is MeadWestvaco Corporation, a large paper and packaging company, whose share value declined over 20% in a single day (August 16) after the company announced that it had been named as a defendant in some 500 asbestos cases involving 6,000 plaintiffs. *MeadWestvaco Stock Drops 20% on Fears of Asbestos Liability*, Wall St. J., Aug. 19, 2002, at C11. The majority of these suits, according to the company's announcement, are pending in West Virginia, Illinois, and Mississippi. *See id.* Other companies have had similar experiences. Most notoriously, oil-field supplier Halliburton's shares dropped 42% in a single day after the company announced that it had lost a $30 million asbestos verdict in Texas. *See* Danielle Sessa, *Trial Lawyers Turn to New Asbestos Targets*, Chi. Sun-Times, Jan. 22, 2002, at 47. Ashland, a major chemical company, saw its share price tumble 17% in a single day, "the biggest one-day decline in at least 22 years, after Goldman, Sachs & Co. and Banc of America Securities downgraded the U.S. company," citing "asbestos concerns" as a key factor. Jeffrey Tomich, *Ashland Has "Layers" of Asbestos Insurance, CFO Says*, Bloomberg News, Aug. 9, 2002. Commenting on Ashland's experience, an analyst explained that "[a] downgrade over asbestos 'is like shouting fire in a crowded place.'" *Id.* Dow Chemical's

shares lost approximately one-third of their value "in a little over a month after analysts became concerned about asbestos claims against Dow's Union Carbide Unit." Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331, 340-41 (2002). Shares of 3M lost 13% of their value over a similar period "due to lawsuits involving respirators (breathing masks)." *Id.* at 341. And Georgia-Pacific Corporation's "stock fell thirty-seven percent because of anticipated asbestos claims." *Id.*; *see also* Roger Parloff, *The $200 Billion Miscarriage of Justice*, Fortune, Mar. 4, 2002, at 154, 156 (reporting that Federal-Mogul's shares lost 99% of their value and Owens Corning's lost 97% of their value as a result of asbestos liability in the years leading up to their bankruptcy filings); Paul M. Sherer, *New Credit Aids Federal-Mogul in Asbestos Battle*, Wall St. J., Jan 4, 2001, at A10 (noting an 81% decline in the value of Armstrong's shares over a one-year period as a result of asbestos liability).

The harm caused by the prospect of asbestos litigation extends beyond declining share prices. Mounting asbestos liability can limit a company's access to capital. For example, "uncertainty surrounding Halliburton's asbestos exposure" led Moody's Investor Service and Standard & Poor's to cut Halliburton's long-term bond rating. Behrens, *supra*, at 341. *See generally* Deborah Hensler, *As Time Goes By: Asbestos Litigation After* Amchem *and* Ortiz, 80 Tex. L. Rev. 1899, 1909 (2002) (noting that lawyers for asbestos defendants reported that their clients' "access to capital diminished"). And, of course, the prospect of vast asbestos liability can drive a company into bankruptcy. "At least fifty-five publicly traded companies have declared bankruptcy as a consequence of their asbestos liabilities." Samuel Issacharoff, *"Shocked": Mass Torts and Aggregate Asbestos Litigation After* Amchem *and* Ortiz, 80 Tex. L. Rev. 1925, 1931 (2002). The list of companies driven to seek bankruptcy protection includes such

familiar names as Owens Corning, U.S. Gypsum, and W.R. Grace. *See id.*

While lower stock prices and reduced access to capital may be understandable to some extent where asbestos manufacturers are concerned, the impact of asbestos litigation is increasingly being felt by companies whose connection to the asbestos industry is tenuous at best. The new asbestos defendants include such unusual suspects as media companies, car manufacturers, and even the maker of Scotch tape. *See* Editorial, *The Job-Eating Asbestos Blob*, Wall St. J., Jan. 23, 2002. A recent study by the RAND Institute for Civil Justice reports that more than 1,000 corporations have been named as defendants in asbestos suits, with the number expected to grow to "several times that." Deborah Hensler *et al.*, RAND Inst. for Civil Justice, *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 11 (2001). The corporations sued to date fall into 44 of the Commerce Department's 82 industrial classifications, meaning that affected firms "span more than half of the industries in the economy." *Id.* The potential impact of asbestos liability on these firms is staggering, with one estimate (from actuarial consulting firm Tillinghast-Towers Perrin) setting total liability as high $200 billion. *See* Parloff, *supra*, at 155-56.

And, of course, the impact of declining stock prices and corporate bankruptcies is not felt only in corporate boardrooms. Often the people most profoundly affected are employees whose retirement plans are heavily invested in corporate stock. The experience of auto-parts manufacturer Federal-Mogul is instructive. Federal-Mogul purchased T&N Plc, "a British company with substantial asbestos liabilities" in 1998. Doron Levin, *Asbestos Toll Includes Employee 401(k) Accounts*, Bloomberg News, Feb. 4, 2002. Soon afterwards, its share price began to fall, from $72 in mid-1998 to just over $1 at the end of July 2001, when the company was on the verge of filing for bankruptcy protection. *See id.* As a result, the value of Federal-Mogul shares in its employees

401(k) accounts—shares that represented one-third of the assets in those accounts at the end of 1998—declined approximately $70 million between the end of 1998 and 2001. *See id.*; *see also* Behrens & Parsons, *supra*, at 141 (noting that employees of companies facing asbestos liability "may lose their investments in company stock").

Past experience demonstrates that ordinary, individual asbestos suits, especially in jurisdictions perceived as being friendly to plaintiffs, can have an immediate impact on share values and can even prompt a company to enter bankruptcy. *See, e.g.*, Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1, A12 (reporting that U.S. Gypsum and Federal-Mogul both sought bankruptcy protection in response to a single verdict in Texas). The impact can be expected to be far more dramatic in this case, which is not ordinary by any measure. The new approach to mass litigation instituted by the West Virginia courts represents a potential sea-change in the course of asbestos litigation nationwide, to which the markets can be expected to respond with more-than-ordinary vigor. If West Virginia is allowed to proceed with its extraordinarily loose aggregation procedure and to apply its own laws to suits that have nothing to do with West Virginia aside from the fact of having been filed there, the state could well become the forum of choice for asbestos litigation, giving its procedures a national rather than an exclusively local significance.

Already there are signs that plaintiffs' lawyers have heard the siren call of West Virginia and other "pro-plaintiff" states. Justice Maynard commented below on the "improper pilgrimage" of asbestos cases that "have migrated here because of the asserted pro-plaintiff bias with which Mobil claims this State handles asbestos litigation." Pet. App. 21a. Commentators and journalists have remarked upon the mobility of asbestos litigation, as well. *See, e.g.*, Hensler, *As Time Goes By*, *supra*, at 1922 (noting reports that tort reform

in Texas provoked "a substantial shift of case filings to Mississippi"); Bell, *supra*, at 17 ("In addition to the Mississippi counties, other notoriously pro-plaintiff jurisdictions crowded with asbestos cases include certain locales in Texas, West Virginia, Louisiana, New York, and California."); Raji Bhagavatula *et al.*, *Asbestos: A Moving Target*, Best's Review, Sept. 2001, at 85, 90 ("Aggregation also has allowed the migration of claims to venues that are friendly to plaintiffs.").

Adding to the potential of this case to alter the asbestos landscape in a way that will have a profound impact on affected companies is the well-noted tendency of lax aggregation rules to expand the number of litigants and thus to raise the stakes. Asbestos litigation is the classic example of what Professor Francis McGovern has dubbed an "elastic" tort. Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 Tex. L. Rev. 1821, 1827 n.26 (1995). Asbestos-related claims are elastic because "the number of cases that are filed (demand) rises as the transaction costs associated with each case (price) are reduced and the number of judicial case resolutions increases (supply)." *Id.* This elasticity is a matter of common knowledge. Professor McGovern himself cites the example of one Baltimore trial court's experience with its asbestos docket. Faced with a backlog of some 2,000 cases, the court "decide[d] to adopt an innovative, common-issue trial so that individual cases could be streamlined." *Id.* at 1840. But instead of clearing the backlog, this decision prompted "plaintiffs' counsel to file an additional 6,500 cases, most of which probably would not have been filed absent the common-issue trial." *Id.*; *see also* Behrens, *supra*, at 350 ("Mass trial procedures also add to the asbestos litigation 'traffic jam' by encouraging the filing of weak claims"); Helen E. Freedman, *Product Liability Issues in Mass Tort—View from the Bench*, 15 Touro L. Rev. 685, 688 (1999) (noting that the increased efficiency associated with consolidation "may encourage additional filings and provide an overly hospitable

environment for weak cases"); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1, 2 (2001) ("Judges, in an effort to clear their dockets, have often adopted case management techniques that have actually encouraged more and more asbestos claims, particularly by claimants who are, at best, mildly impaired or more recently, not sick at all."). If West Virginia's approach to aggregation and choice-of-law is allowed to stand, the number of filings will almost certainly rise dramatically, and many cases will be filed that would never have been filed at all in a more restrictive legal environment. The presence of more plaintiffs can only increase the stakes, giving investors more reason to look at affected companies with a jaundiced eye. This is also why the West Virginia Supreme Court's plea that the asbestos crisis has forced it to take unusual steps (Pet. App. 11a-12a) is not convincing. That court's solution only makes the problem worse.

Investors and rating agencies will plainly react negatively to the prospect of a new and unusually liberal form of mass litigation in a state that is widely perceived to have a "pro-plaintiff bias." Pet. App. 21a. The harm that results will be irreparable. Injuries like declining stock prices and lowered credit ratings are, by their very nature, not redressable by judicial process. No court can restore a company's stock price or order Moody's to increase a company's rating. And if certain companies choose to file for bankruptcy rather than face a West Virginia jury, their decisions will not be undone by an eventual reversal. The only way to address the harm, which is a direct consequence of the constitutional violations at the bottom of this case, is to grant review and reverse the lower court's decision now.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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